

Effective Alternatives Analysis In Mediation: “BATNA/WATNA” Analysis Demystified

BATNA: Best Alternative to a Negotiated Agreement

WATNA: Worst Alternative to a Negotiated Agreement

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Introduction:

In most settlement negotiations, parties are influenced consciously or unconsciously by their assessment of their alternatives to a negotiated agreement. The better their alternatives, the more they may push for a more favorable settlement. The worse their alternatives, the more accommodating they may be in the settlement negotiations. Unfortunately, parties frequently fail to undertake an accurate and comprehensive analysis of their alternatives and, therefore, negotiate poorly based on unrealistic and uninformed ideas of what they might obtain in the absence of a negotiated agreement. Mediators who can help parties to perform a high quality and comprehensible alternatives analysis will often improve negotiation strategy significantly.

This article explains the concept of alternatives analysis and presents a method for conducting an analysis with parties in mediation, including many of the considerations that may affect the parties' perception and use of the analysis.

Essential Concept of BATNA and WATNA:

What are the best (“BATNA”) and worst (“WATNA”) possible outcomes along a particular path if I try to get my interests satisfied in a way that does not require negotiation with the other party? In other words, what are my "win" and "lose" scenarios along any given alternative path, and how likely are these outcomes or something in between?

Important Note:

Do not confuse "alternatives" analysis with "options" analysis. In mediator terminology, “options” are ideas that the parties may generate within the context of a negotiation for possible resolution. The parties evaluate these options, formally or informally, to see how well they satisfy their interests. The parties may consider some ideas to be favorable or "winning" options and others to be "losing" options, but all are theoretically possible bases for resolution between the parties to the dispute even though some are not realistic or would never be acceptable to both parties. The options analysis remains within the context of the negotiation with the other party and is not the same as "BATNA/WATNA" analysis.

Alternative Paths:

Parties may have more than one path they can follow that does not involve negotiation with the other party. The most common alternative path in many mediated cases is litigation or arbitration, in which parties seek a judgment from a judge, jury or arbitrator that they hope will satisfy their interests better than anything they might be able to obtain in a negotiation with the other party. In this instance, the analysis focuses on the "win" and "lose" outcomes in court. However, other alternative paths that might exist could include:

- Seeking results from a higher authority within an organization
- Going to the press
- Holding a strike
- Seeking a new job
- Seeking new (suppliers, buyers, distributors, employees etc.)
- Lumping it (and hoping the situation will improve)

Each of these alternative paths has its' own best and worst outcomes. Parties may wish to analyze the outcomes possible along more than one alternative path, depending upon which strategies they might realistically pursue separate from negotiation with the other party. Of course, the analysis itself is often used to decide whether or not it makes sense for a party to pursue a particular alternative.

Purpose of the analysis:

The purpose of the analysis is to help parties make informed decisions about possible options for resolution or a deal. It is almost always helpful to compare possible outcomes along alternative paths to actual proposals on the table in a negotiation before making a decision within the negotiation. If an alternative looks highly attractive and is highly probable, a party may choose to reject a proposal that is significantly less satisfactory. On the other hand, if proposed options in the negotiation look reasonable or better in comparison to probable alternative outcomes, a party may feel more comfortable accepting a proposed deal. The analysis assists the parties in deciding if a particular resolution is in their best interests or not. It also helps mediators to ground parties in reality and prevent impasse by focusing them on actual possibilities rather than unformulated dreams.

In some cases, a party will reject a proposed resolution even though the probable alternatives are clearly less attractive in a "business" sense. However, the exercise is still useful in this instance because:

1. The parties are making their choices having considered and with full knowledge of these probable alternative outcomes (i.e. "with their eyes wide open").

2. The exercise highlights the existence of other interests, beyond "business" sense, that are driving the party. Knowledge of these interests may be helpful to continued negotiation. At a minimum, parties gain clearer understanding of their interests and the value they are placing upon them.

Mediators should also keep in mind that they may have different values, risk tolerance levels and approaches to decision-making than the parties and take care to respect those differences. Again, the purpose of the analysis is to educate and promote informed decision-making, not to force settlement or impose the mediator's idea of what makes sense.

Form/Content of the Analysis:

Following this section, is a sample BATNA/WATNA analysis in a real estate sale case using a format that is useful in assessing the litigation alternative. The basic formula for the analysis, where money is involved, can be described as "Initial Result" - "Costs" = "Final Outcome." Where money is not involved, the analysis is sometimes simplified to a review of Outcomes and Costs. A second example is provided below using this format where the alternative path considered is not litigation.

The form of analysis presented in this outline is somewhat different than that contained in "decision-tree risk analysis" which serves essentially the same function but is usually more complex, breaking the analysis down into key turning points and multiple projections leading to a variety of final results. For example, in a personal injury case, decision-tree analysis might look at the separate probabilities for establishing each of the legal elements involved (duty, breach, causation and damages) in order to reach an overall probability for win or loss with the expected values for those outcomes in light of the assigned probabilities. Both tools are extremely valuable. The format presented here may be more "user-friendly" for mediators, parties and attorneys in the average case.

As demonstrated in the subsequent examples, outcomes and costs should be developed carefully and specifically so that they can be analyzed and understood by the party and potentially explained to the other side. It is important to assign probabilities to the different predicted outcomes or an estimated range of probability if counsel is wary of being too specific. The probabilities give greater meaning to the numbers. For example, a win of \$100,000 may sound wonderful to a plaintiff until he or she hears that there is only a 5% chance of such a result.

Note: the defendant's analysis is not necessarily a mirror-image of the plaintiff's analysis because the parties may be making different predictions regarding outcomes and may have different costs.

Any outcome, best or worst case, has costs. These costs can be both monetary and non-monetary and should be detailed to the extent possible. The costs used in the analysis are usually limited to future costs that might be avoided in the event that the mediation or negotiation is successful. Costs already incurred are considered water under the bridge. In other words, they are less relevant because settlement at the present time cannot prevent these costs from being incurred.

Many clients underestimate or fail to account for costs when imagining potential best and worst case outcomes, focusing more on “initial results” rather than “final outcomes.” They also tend to overlook the time value of money, forgetting that \$100,000 received two or three years from now, has a lesser value when translated into present day dollars. Finally, they may overlook the fact that they should calculate the “expected value” of their “final outcomes” using the probability of those results (i.e. where the probability of a \$100,000 judgment is only 5%, the expected value of this outcome is $.05 \times \$100,000 = \$5,000$). Mediators who understand these financial realities and can assist clients in examining them have powerful tools.

In addition to best and worst case outcomes, it is often helpful to include a mid-case scenario or a “most likely” case scenario that generally falls somewhere within the outer parameters established by the win and lose scenarios. This can help reduce the potentially distracting effect of extreme win and lose parameters. In some circumstances, however, a case is clearly “all or nothing” and development of a mid-case scenario does not apply.

The content and use of a BATNA/WATNA analysis will be affected by variables such as contingency fee arrangements, the use of in-house counsel, the involvement of insurance companies, statutory or contractual fee-shifting and the possibility of bankruptcy. These variables may have a significant impact on costs or the perception of costs. For example, where one party is represented by an attorney on a contingency fee basis, that party may be much more inclined to “roll the dice” because the bulk of the burden of a loss falls upon the attorney in the event of a loss (WATNA). Similarly, a company or government institution using in-house counsel may discount the costs associated with such counsel as simply part of their overhead.

BATNA/WATNA analysis can also lose meaning in some contexts, such as cases where bankruptcy is a realistic possibility. In that case, the focus of the analysis shifts completely from theoretically possible legal outcomes to one party’s actual resources and the value that the party places on avoiding bankruptcy. In other words, the party in danger of bankruptcy may not care that there is a 95% probability of a significant loss in court if they will choose bankruptcy and avoid the impact of that loss. They may, however, be willing to pay an amount that is within their abilities and seems reasonable to them based upon their desire to avoid bankruptcy.

As suggested earlier, BATNA/WATNA analysis can also be less influential where parties simply refuse to give it meaning because they can afford to do so and have other interests that are more important to them. For example, an employer may be willing to risk significant losses, at high costs, to maintain a reputation that they do not settle certain types of claims. Or some insurance companies may routinely refuse to settle certain cases beyond certain amounts because they are following standard procedures that they believe serve them well overall, and they are willing and able to bear the costs involved in continued litigation. Of course, mediators may still find that a well done BATNA/WATNA analysis is more persuasive than expected or admitted with clients such as these.

LITIGATION PATH

Plaintiff's BATNA (probability estimate 60%)	Mid-Case Scenario (probability estimate 20%)	WATNA (probability estimate 20%)
<p>Plaintiff proves seller was aware of and failed to reveal these problems with the property, and must reimburse for damages.</p> <p>\$45,000 termite damage \$20,000 faulty foundation \$10,000 illegal boundary fence <u>\$10,000 emotional distress</u> \$80,000 Initial Result - Costs - <u>\$30,000 Attorneys' Fees</u> (Receive) \$55,000 Final Outcome</p> <p><i>Other Non-monetary Costs:</i> 2 years in litigation Stress Time off for litigation-related activities</p>	<p>Plaintiff proves awareness of some problems but not others. Court less inclined to grant emotional distress.</p> <p>\$40,000 termite damage <u>\$5,000 emotional distress</u> \$45,000 Initial Result v- Costs - <u>\$30,000 Attorneys' Fees</u> (Receive) \$15,000 Final Outcome</p> <p><i>Other Non-monetary Costs:</i> 2 years in litigation Stress Time off for litigation-related activities</p>	<p>Plaintiff fails to prove any seller liability.</p> <p>\$0 Initial Result</p> <p>- Costs - <u>\$30,000 Attorneys' Fees</u> (Pay Atty) (-\$30,000) Final Outcome</p> <p><i>Other Non-monetary Costs:</i> 2 years in litigation Stress Time off for litigation-related activities No sense of vindication</p>
Defendant's BATNA (probability estimate 50%)	Mid-Case Scenario (probability estimate 30%)	WATNA (probability estimate 20%)
<p>Plaintiff fails to prove any seller liability.</p> <p>\$0 Initial Result</p> <p>- Costs - <u>\$20,000 Attorneys' Fees</u> (Pay Atty) (-\$20, 000) Final</p>	<p>Plaintiff proves awareness of some problems but not others. Court less inclined to grant emotional distress.</p> <p>- \$10,000 illegal boundary fence - <u>\$5,000 emotional</u></p>	<p>Plaintiff proves seller was aware of and failed to reveal these problems with the property, and must reimburse for damages. But defendant has different estimates for some damages.</p> <p>- \$30,000 termite damage - \$15,000 faulty foundation</p>

Outcome	<u>distress</u>	- \$10,000 illegal boundary fence
<i>Other Non-monetary Costs:</i>	- \$15,000 Initial Result	<u>\$5,000 emotional distress</u>
2 years in litigation	- Costs	\$60,000 Initial Result
Stress	- \$20,000 Attorneys' Fees	- Costs
Time off for litigation-related activities	(Pay Atty and Other Party)	- \$20,000 Attorneys' Fees
	(- \$35,000) Final Outcome	(Pay Atty and Other Party)
	<i>Other Non-monetary Costs:</i>	(-\$80,000) Final Outcome
	2 years in litigation	<i>Other Non-monetary Costs:</i>
	Stress	2 years in litigation
	Time off for litigation-related activities	Stress
		Time off for litigation-related

SELF-HELP PATH

Neighbor A is considering whether to resolve issues with Neighbor B regarding irritating noise and messy trees by using a pressure campaign (calls late at night, verbal threats to family members, throwing tree droppings in driveway, calling the police and so on). Neighbor A analyzes how Neighbor B may react, from compliance with requests to retaliatory actions.

Neighbor A - BATNA	Neighbor B - BATNA
<p>Outcomes: Neighbor B promptly eliminates all offensive noise and removes trees at own expense.</p> <p>Costs:</p> <ul style="list-style-type: none">• Neighbor B is upset by the “harassment” and has no interest in a supportive, “good neighbor” relationship, but does not retaliate.• Harassment campaign is wearing on Neighbor A (it’s not easy making all those calls...)• Neighbor A’s reputation suffers because other neighbors hear about Neighbor A’s behavior. <p>Probability: Depends upon assessment of Neighbor B’s personality, but usually would be quite low (5-10%) given typical human reaction to harassment.</p>	<p>Outcomes: Noise is not eliminated and trees remain in place. Neighbor B retaliates, increasing the noise, reporting Neighbor A to housing authority for permit violations, having dog poop on lawn etc.</p> <p>Costs:</p> <ul style="list-style-type: none">• Pressure campaign is highly stressful• Complete loss of relationship as neighbors• Sense of living in war zone• Need to deal with Housing Authority• Need to deal with dog poop and other issues <p>Probability: Again, depends upon Neighbor B’s personality, but this might also be somewhat low as it is an extreme reaction. A mid-case scenario might have the highest probability.</p>

AVOIDANCE PATH

If Neighbor A decided to pursue the pressure campaign described above, and Neighbor B was considering alternatives to negotiation, one path he/she might consider would be “do nothing and hope it goes away.”

Neighbor A - BATNA	Neighbor B - BATNA
<p>Outcome: Neighbor B does not reduce noise, remove trees or in any way respond to Neighbor A. Neighbor A decides to end harassment campaign in light of lack of response.</p> <p>Costs:</p> <ul style="list-style-type: none">• Stress of self-control in light of provocation• Children upset by threats• Stress of dealing with police• Stress of enduring harassment campaign while it endures• No good neighbor relationship with Neighbor A <p>Probability: Very low given Neighbor A's apparent personality, initiating the harassment campaign. 2%?</p>	<p>Outcome: Neighbor A escalates the conflict in serious ways. Fear of violence. Possible official action to force tree removal. Police citation regarding the noise.</p> <p>Costs:</p> <ul style="list-style-type: none">• Stress of living in war zone• Serious psychological trauma suffered by children• Stress of dealing with police• Terrible relationship with Neighbor A• Expense of tree removal and efforts in any proceedings to fight required removal• Loss of relationships with other neighbors <p>Probability: This may also be low in probability as it is extreme. (5-10%) A mid-case scenario is likely to have the highest probability.</p>

Initial Presentation of Analysis Within a Mediation

When suggesting development of BATNA/WATNA analyses or review of previously prepared analyses, mediators should keep in mind the purpose discussed above and, in fact, share this purpose with the parties. By explaining the educational purpose and method of analysis, mediators can reduce the tendency to perceive this tool as "blackmail" or inappropriate arm-twisting.

When BATNA/WATNA analysis is almost inevitable, as in cases already in litigation, it is a good idea to ask attorneys to prepare and discuss the analysis with their clients prior

to the mediation. Advantages of this approach are that the analysis may be more thoughtful given more time to prepare and the clients have had more time to absorb the implications prior to the mediation. Possible disadvantages of this approach are that attorneys may be less honestly spontaneous about their predictions of litigated outcomes with the mediator. Of course, many attorneys undertake this analysis prior to mediation or negotiation as part of their own case preparation.

In fact, negotiation experts frequently advise careful analysis and development of at least one BATNA and WATNA prior to entry in negotiation. Preparation of a good BATNA can strengthen a party's leverage in the negotiation. Whether or not a good BATNA exists or can be developed, parties are well advised to enter negotiations with accurate information about possible alternative outcomes because this gives them a better sense of how to manage the negotiation. For example, parties with weak BATNAs or highly undesirable WATNAs may want to take care not to burn any bridges and/or prepare to minimize the damage this information may cause if known by the other party.

If you believe it is likely that an examination of BATNA and WATNA will be pertinent during the mediation, it may be helpful to allude to the possible need for this kind of analysis early in the process, in the mediator's opening statement. A simple statement should be sufficient, suggesting that it may be helpful to the parties, at some point in the process, to examine their alternatives outside of mediation so as to compare them to options on the table in the mediation. This can be stated without using the terms "BATNA" and "WATNA" which are likely to be unfamiliar and confusing to the parties.

Timing and Context of Analysis:

As with any other tool, mediators will need to use their judgment in deciding whether to suggest a BATNA/WATNA analysis and in deciding how and where to perform it. It is often most useful to conduct this analysis after information-gathering and exploration of interests and prior to beginning distributive bargaining (i.e. typically, the money negotiation).

If the parties appear to be reaching an interest-based resolution with relative ease, the mediator may decide not to undertake a BATNA/WATNA analysis at all, or only in a cursory fashion as part of reality-testing before closure. The reason to consider carefully whether or not to inject BATNA/WATNA analysis in this context is that, by its nature, the analysis can seem negative or threatening and may inject an undesired tone into a negotiation that is proceeding amicably.

However, if parties clearly have substantial work to do in order to reach resolution and the mediator anticipates hard bargaining, the analysis is probably recommended. When conducted prior to formulation of initial offers and counter-offers, the analysis helps to ground the parties in reality and formulate initial numbers that bear a reasonable relationship to possible outcomes outside of the mediation and are therefore, hopefully, less shocking to the other party. In any event, the analysis usually serves as a tool to help the parties and the mediator explain offers and counter-offers.

Typically, it is wise to develop the analysis in private session with each of the parties and their attorneys. Those who do not welcome the analysis are more likely to go along with it in private. Moreover, in a confidential caucus, parties and attorneys tend to be more forthcoming and realistic about their alternatives. When not faced with the need to posture in front of the other party or the fear of losing face, many attorneys actually welcome the opportunity to educate their clients about the risks of the case with the support of the mediator. If the mediator believes that the parties would also benefit from hearing a persuasive presentation on possible outcomes by opposing counsel, the analysis can always be reviewed in a subsequent joint session. Note: Even when developed in private, confidential sessions, mediators should not assume that parties or attorneys have been completely forthcoming about their alternatives analysis.

Who Provides the Information for the Analysis:

When the analysis focuses on possible litigated outcomes, attorneys are the natural sources of information. Ideally, they have the litigation experience and knowledge of the venue in which they operate to be able to provide "expert" information about possible best and worst outcomes. Even if they are less knowledgeable than the mediator might like, they will expect to be consulted if this analysis is undertaken. When the analysis focuses on alternative paths other than litigation, the parties themselves and/or other types of experts or resources may be needed to provide information about possible outcomes.

When parties are in litigation but are not represented by attorneys or do not have attorneys present in the mediation, development of the analysis is usually more difficult. Sometimes, mediators can prompt parties to consult with an attorney prior to mediation, or by phone during the mediation. If this is not possible, the mediator may try to guide the parties through the analysis, but few parties will have the legal expertise necessary to make reasonable predictions about litigation outcomes. If the mediator provides the information for the analysis (assuming that the mediator is competent to do so), the mediator risks losing neutrality and/or the appearance of neutrality. Whether or not it is appropriate for a mediator to predict legal outcomes is controversial. However, if a mediator chooses to do so, the mediator is on safest ground when suggesting possible ranges of outcomes rather than highly specific outcomes and probabilities, and taking care to remind the parties that this does not constitute legal advice and cannot substitute for the opinion of their own attorney.

Quality of Analysis:

The more accurate the analysis, the more helpful it will be to the parties in making informed decisions. Mediators can try to improve the quality of analysis by taking steps, as necessary, to educate the parties and their representative regarding the analysis. They can also guide the parties through the elements of the analysis during private sessions so as to ensure that it is done thoroughly, and play devil's advocate and ask reality testing

questions when attorneys make predictions that seem overly exaggerated or inaccurate. However, when first drawing out the analysis, the mediator may find it more effective to accept a party or attorney's estimations for possible best and worst outcomes. It is usually easier to question and refine these estimates using the other party's predictions and information rather than risking more direct contradiction by the mediator.

Resistance:

Parties and attorneys rarely resist undertaking the analysis if they understand and believe that it is in their own best interests, serving as a useful tool for informed decision-making. The tone and confidence of the mediator in presenting this tool are usually significant to acceptance. If parties feel pressured or fear that it will be used as a hammer against them, or shared inappropriately with the other party, they will naturally resist.

If parties refuse to undertake the analysis despite helpful education by the mediator, the mediator may want to explore the reasons behind the refusal to better understand the interests driving the resistance. If these can be discovered, the mediator may be better able to negotiate on the process with the party or understand why the analysis would not be beneficial in that case.

Sometimes attorneys assure mediators that they have undertaken the analysis with the parties but say that they do not want to share it with the mediator. Again, this can be explored and negotiated as with any other tool in the process. Even when attorneys have refused to share their own thinking with the mediator, the mediator may gain helpful information by sharing their own or the other party's estimate of a range of possible outcomes and noting how the attorneys react or correct them.

Use/Transfer of BATNA/WATNA Information between the Parties:

As with many subjects discussed in private session, parties and attorneys may want to keep some or all aspects of the analysis confidential. However, use of this information is often an extremely useful tool in educating the parties to better understand their risks. Parties and attorneys almost invariably overestimate their best case scenarios and underestimate their worst case scenarios for many reasons based in human psychology. One of the mediator's tasks is to help parties make more realistic assessments of their case to improve decision-making. Mediators with knowledge of these psychological tendencies can educate the parties about them and increase their receptivity to more realistic BATNA and WATNA assessments.

A significant reality check on any party's BATNA/WATNA analysis is the other party's assessment of the same case from the other side. In particular, one party's assessment of their best case outcome may look quite different from the other party's assessment of their worst case outcome. Parties will often give the mediator permission to share with the other party their best case prediction when they understand that it gives the mediator leverage to move the other party in their direction towards settlement. They may be more concerned about the mediator sharing their worst case scenario and any costs involved on their side (best or worst case) but this information is often less helpful as leverage.

Mediators should, nevertheless, seek permission to share any information gained during the analysis that they believe will help the parties to better understand the case and the other party. For example, a mediator may discover during BATNA/WATNA analysis that the attorney for one of the parties is serving on a contingency fee basis. This attorney may be reluctant to disclose this fact (and it may be best not to do so) but the mediator may want to explore with the attorney whether it would actually be helpful for the other party to understand that they have less leverage than they think if they are assuming incorrectly that the costs of litigation are mounting for both parties, with both parties sharing the same types of costs in going forward.

When parties, experts or attorneys provide estimates regarding the probability of particular best, worst and mid-case outcomes, it is usually helpful to inquire about the basis for these estimates. In a litigated matter, this leads naturally into a discussion of the strengths and weaknesses of the case on both sides. In a non-litigated matter, the mediator should lead the parties in a thoughtful analysis of their reasons for believing that a particular outcome is more or less likely. As with other information, parties may be evaluating strengths and weaknesses quite differently, and it can be highly educational for them to learn how the other party assesses the probabilities and why. The more reliable and detailed the information they have to support their analyses, the more likely they are to be persuasive in the mediation. Again, most parties and attorneys are willing to allow the mediator to share information that they believe will be helpful in persuading the other party that they over-estimating their strengths or under-estimating their weaknesses.

When sharing any information garnered during the analysis, mediators should keep in mind the educational tone. It is very easy for parties to react in a defensive, hostile manner to an analysis that seems threatening and/or highly exaggerated. Mediators can also remind parties that this is a "background" analysis that can be set to the side as parties return to negotiation within the mediation. They do not need to conclusively determine what would happen court or along another alternative path during the mediation, but rather get a clearer sense of probable outcomes as possible reference points for their negotiations.

Connection to Development of Settlement Proposals:

In a litigated matter where money is likely to be a component of the negotiation, the specific elements identified as part of the possible outcomes explored in a BATNA/WATNA analysis often serve as the basis for development of settlement proposals. For example, in an employment discrimination case, the predicted outcomes may be based on elements that a court would include in an award such as back pay, front pay, emotional distress and so on. Many parties will naturally use these same factors to formulate their offers and counter-offers in mediation, usually working toward a settlement amount that lies within the parameters created by the best and worst case outcomes in court. It is very difficult to reach a settlement if one or both parties are seeking an amount outside of these parameters.

Where the negotiation focuses less on money or other specific outcomes that might be awarded by a court, the BATNA/WATNA analysis may be less influential in the

development of settlement proposals and may be completely unrelated to what the parties decide to do. In either case, parties should be reminded that the BATNA/WATNA analysis is a “backdrop” analysis for the negotiation and that they are free to settle their dispute in any mutually agreeable fashion, perhaps completely unrelated to the outcomes possible along alternative paths.

Conclusion:

BATNA/WATNA analysis can be highly influential in case assessment and settlement. Many clients need to consider intelligently whether a possible negotiated settlement makes sense or whether they would prefer to pursue some other alternative that might yield better results or involve lower costs. Mediators who can walk their clients through a carefully detailed and organized BATNA/WATNA analysis are providing a valuable service. Use of a format like the one presented here, along with clear understanding of how to use the analysis, should improve the mediator’s ability to work effectively with this tool.

Biography

Jessica Notini is a mediator and trainer based in the San Francisco Bay Area. She is the president of the Northern California Mediation Association.